IN THE SUPREME COURT OF IOWA

Supreme Court No. 16-0076
United States District Court for the Northern District of Iowa
No. 5:15-cv-04020

BOARD OF WATER WORKS TRUSTEES OF THE CITY OF DES MOINES, IOWA,

Plaintiff-Appellant

vs.

SAC COUNTY BOARD OF SUPERVISORS AS TRUSTEES OF DRAINAGE DISTRICTS 32, 42, 65, 79, 81, 83, 86, and CALHOUN COUNTY BOARD OF SUPERVISORS and SAC COUNTY BOARD OF SUPERVISORS AS JOINT TRUSTEES OF DRAINAGE DISTRICTS 2 AND 51 and BUENA VISTA COUNTY BOARD OF SUPERVISORS and SAC COUNTY BOARD OF SUPERVISORS AS JOINT TRUSTEES OF DRAINAGE DISTRICTS 19 and 26 and DRAINAGE DISTRICTS 64 and 105.

Defendants-Appellees

CERTIFIED FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA REASSIGNED FROM HONORABLE MARK W. BENNETT TO HONORABLE LEONARD T. STRAND, DISTRICT COURT JUDGE, PRESIDING, ON FEB. 17, 2016

FINAL BRIEF OF APPELLANT BOARD OF WATER WORKS TRUSTEES OF THE CITY OF DES MOINES, IOWA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

FEDERAL STATUTES AND REGULATIONS

STATE STATUTES AND REGULATIONS

IOWA STATE CONSTITUTION

OTHER AUTHORITIES

SECONDARY SOURCES

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. As a matter of Iowa law, does the doctrine of immunity of drainage districts as applied in cases such as Fisher v. Dallas County, 369 N.W.2d 426 (Iowa 1985), grant drainage districts unqualified immunity from all of the damage claims set forth in the Complaint (docket no. 2)?

Iowa Cases:

Alexander v. Med. Assocs. Clinic, 646 N.W.2d 74 (Iowa 2002)

Atwood v. Vilsack, 725 N.W.2d 641 (Iowa 2006)

Barlow v. Iblings, 156 N.W.2d 105 (Iowa 1968)

Barreca v. Nickolas, 683 N.W.2d 111 (Iowa 2004)

Beebe v. Magoun, 97 N.W. 986 (Iowa 1904)

Berent v. City of Iowa City, 738 N.W.2d 193 (Iowa 2007)

Bierkamp v. Rogers, 293 N.W.2d 577 (Iowa 1980)

Bormann v. Bd. of Sup'rs in and for Kossuth Cnty., 584 N.W.2d 309 (Iowa 1998)

Bowers v. Polk Cnty. Bd. of Sup'rs, 638 N.W.2d 682 (Iowa 2002)

Bowman v. Humphrey, 109 N.W. 714 (Iowa 1906)

Boyd v. City of Oskaloosa, 161 N.W. 491 (Iowa 1917)

Canal Const. Co. v. Woodbury Cnty., 121 N.W. 556 (Iowa 1909)

Chicago Cent. & Pac. R.R. Co. v. Calhoun Cnty. Bd. of Sup'rs, 816 N.W.2d 367 (Iowa 2012)

City of Clinton v. Cedar Rapids & Mo. River R.R. Co., 24 Iowa 455 (1868)

City of Sioux City v. Jacobsma, 862 N.W.2d 335 (Iowa 2015)

Clary v. Woodbury Cnty., 113 N.W. 330 (Iowa 1907)

Dalarna Farms v. Access Energy Coop., 792 N.W.2d 656 (Iowa 2010)

Dashner v. Mills Cnty., 55 N.W. 468 (Iowa 1893)

Ferguson v. Firmenich Mfg. Co., 42 N.W. 448 (Iowa 1889)

Fisher v. Dallas Cnty., 369 N.W.2d 426 (Iowa 1985)

Freeman v. Grain Processing Corp., 848 N.W.2d 58 (Iowa 2014)

Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168 (Iowa 2004)

Galloway v. State, 790 N.W.2d 252 (Iowa 2010)

Gard v. Little Sioux Intercounty Drainage Dist. of Monona and Harrison Cntys., 521 N.W.2d 696 (Iowa 1994)

Gibb v. Hansen, 286 N.W.2d 180 (Iowa 1979)

Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982)

Goodell v. Humboldt Cnty., 575 N.W.2d 486 (Iowa 1998)

Gravert v. Nebergall, 539 N.W.2d 184 (Iowa 1995)

Hatcher v. Bd. of Sup'rs of Greene Cnty., 145 N.W. 12 (Iowa 1914)

Haynes v. Presbyterian Hosp. Ass'n, 45 N.W.2d 151 (Iowa 1950)

Hensler v. City of Davenport, 790 N.W.2d 569 (Iowa 2010)

Johnson v. Univ. of Iowa, 408 F. Supp. 2d 728 (S.D. Iowa 2004)

Kersten Co., Inc. v. Dep't of Soc. Servs., 207 N.W.2d 117 (Iowa 1973)

King v. State, 818 N.W.2d 1 (Iowa 2012)

Koenig v. Koenig, 766 N.W.2d 635 (Iowa 2009)

Lee v. State, Polk Cnty. Clerk of Court, 815 N.W.2d 731 (Iowa 2012)

Mason City & Ft. D.R. Co. v. Bd. of Sup'rs of Wright Cnty., 121 N.W. 39 (Iowa 1909)

Miller v. Boone Cnty. Hosp., 394 N.W.2d 776 (Iowa 1986)

Miller v. Monona Cnty., 294 N.W. 308 (Iowa 1940)

Owens v. Brownlie, 610 N.W.2d 860 (Iowa 2000)

Polk Cnty. Bd. of Sup'rs v. Polk Commw. Charter Comm'n, 522 N.W.2d 783 (Iowa 1994)

Polk County Drainage Dist. Four v. Iowa Natural Resources Council, 377 N.W.2d 236 (Iowa 1985)

Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1 (Iowa 2004)

Robert's River Rides, Inc. v. Steamboat Dev. Corp., 520 N.W.2d 294 (Iowa 1994)

Shearer v. Perry Cmty. Sch. Dist., 236 N.W.2d 688 (Iowa 1975)

Shook v. Crabb, 281 N.W.2d 616 (Iowa 1979)

Sisson v. Bd. of Sup'rs of Buena Vista Cnty., 104 N.W. 454 (Iowa 1905)

Spence v. McDonough, 42 N.W. 371 (Iowa 1889)

State ex rel. Iowa Emp't Sec. Comm'n v. Des Moines Cnty., 149 N.W.2d 288 (Iowa 1967)

Stuart v. Pilgrim, 74 N.W.2d 212 (Iowa 1956)

Turner v. Turner, 304 N.W.2d 786 (Iowa 1981)

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)

Vogt v. City of Grinnell, 110 N.W. 603 (Iowa 1907)

Voogd v. Joint Drainage Dist. No. 3-11, 188 N.W.2d 387 (Iowa 1971)

Other Cases:

Ark. State Highway Comm'n v. Steed, 411 S.W.2d 17 (Ark. 1967)

Dougan v. Rossville Drainage Dist., 757 P.2d 272 (Kan. 1988)

Ezzard v. U.S., 7 F.2d 808 (8th Cir. 1925)

Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 123 S. Ct. 2156, 156 L. Ed. 2d 97 (2003)

Fresh v. Gilson, 41 U.S. 327, 10 L. Ed. 982 (1842)

Gerbers, Ltd. v. Wells Cnty. Drainage Bd., 608 N.E.2d 997 (Ind. Ct. App. 1993)

Global Mail Ltd. v. United States Postal Serv., 142 F.3d 208 (4th Cir. 1998)

Holytz v. City of Milwaukee, 115 N.W.2d 618 (Wis. 1962)

Howell v. M'Coy, 1832 WL 2994, 3 Rawle 256 (Pa. 1832)

Hunter v. North Mason High Sch., 539 P.2d 845 (Wash. 1975)

Kilburn v. Fort Bend Cnty. Drainage Dist., 411 S.W.3d 33 (Tex. App. 2013)

Landview Landscaping, Inc. v. Minnehaha Creek Watershed Dist., 569 N.W.2d 237 (Minn. Ct. App. 1997)

Lezina v. Fourth Jefferson Drainage Dist., 190 So. 2d 97 (La. Ct. App. 1966)

Milwaukee Metro. Sewerage Dist. v. City of Milwaukee, 691 N.W.2d 658 (Wis. 2005)

N.Y. Trust Co. v. Eisner, 256 U.S. 345, 41 S. Ct. 506, 65 L. Ed. 963 (1921)

Parriott v. Drainage Dist. No. 6 of Peru, 410 N.W.2d 97 (Neb. 1987)

Plyler v. Doe, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982)

Roark v. Macoupin Creek Drainage Dist., 738 N.E.2d 574 (Ill. App. Ct. 2000)

Rosenbrahn v. Daugaard, 61 F. Supp. 3d 845 (D.S.D. 2014)

St. Francis Drainage Dist. v. Austin, 296 S.W.2d 668 (Ark. 1956)

Western & A. R.R. v. Henderson, 279 U.S. 639, 49 S. Ct. 445, 73 L. Ed. 884 (1929)

Statutes:

Iowa Code § 331.301

Iowa Code § 468.1

Iowa Code § 468.128

Iowa Code § 468.130

Iowa Code § 468.150

Iowa Code § 468.500

Iowa Code § 684A.1

Iowa Code § 1207 (1873)

Iowa Code title X, ch. 2 (1873)

§ 1989a1, Iowa Code Supplement (1907)

Other Sources:

1904 Iowa Acts Ch. 67

1904 Iowa Acts Ch. 68, § 1

Eugene Davis, Water Rights in Iowa, 41 Iowa Law Rev. 216 (1956)

Iowa Const. Art. I, § 18

Iowa Const. Art. III, § 38A

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Iowa Op. Att'y. Gen 54, Op. No. 79-4-7, 1979 WL 20913 (April 6, 1979)

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Ivan L. Pollock, History of Economic Legislation in Iowa at 92-93 (St. Hist. Soc'y of Iowa 1918)

Robert F. Williams, Equality Guarantees in State Constitutional Law, 63 Tex. L. Rev. 1195 (1985)

Sam F. Scheidler, Survey of Iowa Law: Implementation of Constitutional Home Rule in Iowa, 22 Drake L. Rev. 294 (1973)

2. As a matter of Iowa law, does the doctrine of immunity grant drainage districts unqualified immunity from equitable remedies and claims, other than mandamus?

Iowa Cases:

Busch v. Joint Drainage Dist. No. 49-79, Winnebago and Hancock Cntys., 198 N.W. 789 (Iowa 1924)

Chicago Cent. & Pac. R.R. Co. v. Calhoun Cnty. Bd. of Sup'rs, 816 N.W.2d 367 (Iowa 2012)

Polk County Drainage Dist. Four v. Iowa Natural Resources Council, 377 N.W.2d 236 (Iowa 1985)

Reed v. Muscatine Louisa Drainage Dist. No. 13, 263 N.W.2d 548 (Iowa 1978)

Sedore v. Bd. of Trs. of Streeby Drainage Dist. No. 1 of Wapello and Davis Cntys., 525 N.W.2d 432 (Iowa App. 1994)

Sisson v. Bd. of Sup'rs of Buena Vista Cnty., 104 N.W. 454 (Iowa 1905)

Voogd v. Joint Drainage Dist. No. 3-11, 188 N.W.2d 387 (Iowa 1971)

Statutes:

Iowa Code § 657.2(4)

Iowa Code § 684A.1

3. As a matter of Iowa law, can the plaintiff assert protections afforded by the Iowa Constitution's Inalienable Rights, Due Process, Equal Protection, and Takings Clauses against drainage districts as alleged in the Complaint?

Iowa Cases:

Bd. of Sup'rs of Linn Cnty. v. Dept. of Revenue, 263 N.W.2d 227 (Iowa 1978)

Bd. of Sup'rs of Pottawattamie Cnty. v. Bd. of Sup'rs of Harrison Cnty., 241 N.W. 14 (Iowa 1932)

Bd. of Trs. of Monona-Harrison Drainage Dist. No. 1 v. Bd. of Sup'rs of Woodbury and Monona Cntys., 197 N.W. 82 (Iowa 1924)

Bd. of Trs. of Monona-Harrison Drainage Dist. No. 1 in Monona and Harrison Cntys v. Bd. of Sup'rs of Monona Cnty, Iowa, 5 N.W.2d 189 (Iowa 1942)

C. Hewitt & Sons Co. v. Keller, 275 N.W. 94 (Iowa 1937)

City of Akron v. Akron Westfield Cmty. Sch. Dist., 659 N.W.2d 223 (Iowa 2003)

City of Ames v. Story Cnty., 392 N.W.2d 145 (Iowa 1986)

City of Coralville v. Iowa Utilities Bd., 750 N.W.2d 523 (Iowa 2008)

City of W. Branch v. Miller, 546 N.W.2d 598 (Iowa 1996)

Godfrey v. State, 752 N.W.2d 413 (Iowa 2008)

Incorporated Town of Sibley v. Ocheyedan Elec. Co., 187 N.W. 560 (Iowa 1922)

Scott Cnty. v. Johnson, 222 N.W. 378 (Iowa 1928)

State ex rel. Bd. of R.R. Com'rs of State of Iowa v. Stanolind Pipe Line Co., 249 N.W. 366 (Iowa 1933)

State v. Barker, 89 N.W. 204 (Iowa 1902)

Other Cases:

Hunter v. City of Pittsburgh, 207 U.S. 161, 28 S. Ct. 40, 52 L. Ed. 151 (1907)

U.S. v. 50 Acres of Land, 469 U.S. 24, 105 S. Ct. 451, 83 L. Ed. 2d 376 (1984)

U.S. v. Wayne Cnty., Ky, 252 U.S. 574, 40 S. Ct. 394, 64 L. Ed. 723 (1920)

Wayne Cnty., Ky. v. U.S., 53 Ct. Cl. 417 (Ct. Cl. 1918)

Statutes:

Iowa Code § 388.4

Iowa Code § 684A.1

Other Sources:

Kathleen S. Morris, The Case for Local Constitutional Enforcement, 47 Harv. C.R.-C.L. L. Rev. 1 (2012)

4. As a matter of Iowa law, does the plaintiff have a property interest that may be the subject of a claim under the Iowa Constitution's Takings Clause as alleged in the Complaint?

Iowa Cases:

Bormann v. Bd. of Sup'rs in and for Kossuth Cnty., 584 N.W.2d 309 (Iowa 1998)

Bowman v. Humphrey, 109 N.W. 714 (Iowa 1906)

Freeman v. Grain Processing Corp., 848 N.W.2d 58 (Iowa 2014)

Newton v. City of Grundy Center, 70 N.W.2d 162 (Iowa 1955)

Oak Leaf Country Club, Inc. v. Wilson, 257 N.W.2d 739 (Iowa 1977)

Perkins v. Bd. of Sup'rs of Madison Cnty., 636 N.W.2d 58 (Iowa 2001)

Perry v. Howe Co-Op. Creamery Co., 101 N.W. 150 (Iowa 1904)

Robert's River Rides, Inc. v. Steamboat Dev. Corp., 520 N.W.2d 294 (Iowa 1994)

State ex rel. Bd. of R.R. Com'rs of State of Iowa v. Stanolind Pipe Line Co., 249 N.W. 366 (Iowa 1933)

Tretter v. Chicago & G. W. Ry. Co., 126 N.W. 339 (Iowa 1910)

Vogt v. City of Grinnell, 110 N.W. 603 (Iowa 1907)

Willis v. City of Perry, 60 N.W. 727 (Iowa 1894)

Other Cases:

U.S. v. General Motors Corp., 323 U.S. 373, 65 S. Ct. 357, 89 L. Ed. 311 (1945)

Statutes:

Iowa Code § 388.4

Iowa Code § 455B.111

Iowa Code § 684A.1

Other Sources:

Eugene Davis, Water Rights in Iowa, 41 Iowa Law Rev. 216 (1956)

ROUTING STATEMENT

This Court should retain this case because Iowa Code § 684A.1 vests this Court with exclusive authority to respond to certified questions. Iowa R. App. P. 6.1101(1).

STATEMENT OF THE CASE

This case comes to this Court on questions certified from the United States District Court from the Northern District of Iowa ("District Court"). The Complaint, filed March 16, 2015 by the Board of Water Works Trustees of the City of Des Moines, Iowa ("DMWW"), includes claims set forth in ten counts. (App. 1-80).[1] Defendant's Amended Answer was filed May 22, 2015. (App. 81-109).

On September 24, 2015, the defendants ("Drainage Districts") filed a motion seeking partial summary judgment ("Motion") as to Counts III through X of the Complaint. (App. 110-122). The Drainage Districts asserted immunity from suit for damages and equitable relief as a matter of law and that DMWW could not assert constitutional claims. (App. 110-122). DMWW resisted the Motion, challenging the applicability, continuing validity, and constitutionality of the precedent on which the Motion was based. (App. 123-178).

The District Court requested the parties submit a joint statement identifying issues of Iowa law that could be certified to this Court pursuant to Iowa Code Chapter 684A, and the parties' respective positions on

[1] For purposes of DMWW's proof brief, references to the record will be to the docket number in the District Court.

certification. (App. 226-227). An agreed statement of issues was submitted. DMWW agreed that certification of questions would be appropriate. (App. 237-243). The Drainage Districts resisted certification. (App. 230-237).

After hearing argument on the Motion on December 21, 2015 the Court issued its order certifying questions to this Court on January 13, 2016, and deferring its ruling on the Motion until the District Court receives this Court's response. (App. 294-319). The case was docketed with this Court on January 13, 2016.

STATEMENT OF THE FACTS

DMWW is a municipal water utility in Des Moines, Iowa organized and acting under Iowa Code Chapter 388, which provides water service regionally in the Des Moines area. (App. 5-6 ¶ 23). DMWW provides drinking water to approximately 500,000 Iowans. (App. 14 ¶ 69).

Drainage Districts are organized and exist under authority of Article I, § 18 of the Iowa Constitution and Iowa Code Chapter 468. (App. 6 ¶ 27). They are managed, or jointly managed, by the Sac, Buena Vista, and Calhoun County Boards of Supervisors as trustees. (App. 6 ¶¶ 25, 29). The Drainage Districts are political subdivisions of the State of Iowa. (App. 6 ¶ 25).

DMWW obtains a portion of its raw water supply from the Raccoon and Des Moines Rivers by means of direct river intake, and by access to shallow alluvial aquifers and surface waters that are recharged by the rivers. (App. 14 ¶ 72). These waters have been increasingly contaminated by nitrate. (App. 9-19 ¶¶ 45-107).

Under the Safe Drinking Water Act, 42 U.S.C. § 300f, DMWW is obligated to meet the maximum contaminant level ("MCL") standards set by the Environmental Protection Agency (the "EPA") in its finished water. The MCL for nitrate is 10 mg/L. 40 C.F.R. § 141.62(b)(7) (2015); (App. 2-3 ¶ 5).

DMWW has a nitrate removal facility that it operates when needed. (App. 17-19 ¶¶ 92-105).

Nitrate is a soluble ion of Nitrogen (N) found in the soil. (App. 27-28 ¶ 144). It moves out of the soil only with water. (App. 27-28 ¶ 144). Under natural hydrologic conditions very little nitrate is discharged from groundwater to streams, but artificial subsurface drainage such as the infrastructure operated by the Drainage Districts short-circuits the natural conditions that otherwise keep nitrate out of streams and rivers. (App. 28 ¶ 146). From 1995 to 2014, nitrate concentrations in the Raccoon River at DMWW intake points exceeded the 10 mg/L standard for drinking water at least 1,636 days—24% of the time. (App. 18 ¶ 99). In 2013, 2014, and 2015, persistent peaks in nitrate levels in DMWW's water supply were unprecedented (App. 18-19 ¶¶ 99-105). For example, in September, October, November, and December 2014, the average nitrate concentration in the Raccoon River was 11.89 mg/L, 13.23 mg/L, 12.43 mg/L, and 12.56 mg/L respectively. (App. 19 ¶ 104).

From March 28, 2014, until December 30, 2014, DMWW staff drew water samples on 40 separate occasions from 72 sample site locations in drainage districts in Sac, Calhoun, and Buena Vista counties. (App. 25 ¶ 137). The data collected reflects discharge of groundwater containing nitrate

substantially in excess of 10 mg/L on various dates. (App. 25-27 ¶¶ 139-140).

The primary source of nitrate pollution of the Raccoon River and Des Moines River is agricultural drainage infrastructure such as that created, maintained, and operated by Drainage Districts. (App. 28-29 ¶¶ 145-153).

The pollution of the rivers and streams of Iowa by nutrients, including nitrate, is a problem of statewide and national significance. (App. 7-9 ¶¶ 32-44). Iowa has over 640 waters that are currently considered to be impaired, some by reason of nitrate. (App. 8 ¶ 37).

The nutrient pollution of Iowa's streams and rivers, including the Raccoon River, is not just a local problem. Such pollution also contributes significantly to hypoxia in the Gulf of Mexico. (App. 3 ¶ 7, App.7-8 ¶¶ 33-38). Gulf hypoxia has been identified by federal law as a national problem since at least 1998 by adoption of Title VI of the Coast Guard Authorization Act of 1998, Pub. L. No. 105–383, 112 Stat. 3411 (Nov. 13, 1998), as recently amended by the Harmful Algal Bloom and Hypoxia Research and Control Amendments Act of 2014, Pub. L. No. 113-124, 128 Stat. 1379 (June 30, 2014), codified at 33 U.S.C. § 4001, et seq. The National Oceanic and Atmospheric Administration has established that agricultural drainage is a significant contributor to hypoxia in the Gulf of Mexico:

> Drainage of agricultural land by tile drains and other means contributes to the high nitrate concentration and flux in the Mississippi River. Tile drains short-circuit the flow of ground water by draining the top of the ground water system into tile lines and ditches and eventually to the Mississippi River. Tile drainage water can have very high nitrate concentrations.

(App. 8 ¶ 36).

The Iowa Department of Agriculture, Iowa Department of Natural Resources, and Iowa State University have assessed the issues of nutrients in Iowa waters and the Gulf of Mexico in a comprehensive report titled the "Iowa Nutrient Reduction Strategy." According to the report, sources not currently being subject to permitting as point sources like the Drainage Districts create 92% of nitrate pollution entering Iowa's waterways. These sources include agricultural drainage, which is noted as a major contributor of nitrate pollution. (App. 8-9 ¶¶ 39-43).

ARGUMENT

Drainage districts have historically enjoyed a broad immunity from suit, but this Court should critically examine the contours and limits of such immunity as applied here. When the reason for a rule ends, so should the rule. Koenig v. Koenig, 766 N.W.2d 635, 645 (Iowa 2009).

Drainage Districts asked the District Court to dismiss DMWW's claims for damages and equitable relief set forth in a Complaint that alleges drainage district pollution jeopardizes the safety of the drinking water of at least 500,000 Iowans. Drainage Districts sought dismissal based on a judicially created immunity doctrine uniquely available to drainage districts. They also asked the District Court to deny "takings" and other constitutional claims made by DMWW on the grounds that DMWW neither has constitutional rights, nor the right to assert them against the Drainage Districts.

The unqualified immunity that drainage districts have enjoyed for over 100 years is based on a foundation that makes no sense today, particularly in a water pollution case, and also violates the equal protection, due process, just compensation, and inalienable rights guarantees of the Iowa Constitution. Further, and without regard to the status of the immunity doctrine as it may apply to other claims, such doctrine does not defeat either

of DMWW's claims for equitable relief or taking without just compensation.

I. THE CERTIFIED QUESTIONS AND THE FACTS PERTAINING THERETO

This Court may answer questions certified to it by a federal district court under Iowa Code Ch. 684A. Life Investors Ins. Co. of Am. v. Est. of Corrado, 838 N.W.2d 640, 643 (Iowa 2013). This Court may decline to answer certified questions "if the court lacks specific findings of fact or finds the factual record to be unclear." Id. at 643-44 (internal citations omitted).

This case comes to this Court after the Drainage Districts filed a motion captioned as a motion for partial summary judgment under Fed. R. Civ. P. 56. However, the Drainage Districts' motion should be viewed as a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) because the motion relied entirely on two facts alleged in the Complaint. (App. 121-122). Thus, the Motion is properly viewed as the equivalent of a motion to dismiss for failure to state a claim. See Fed. R. Civ. P. 12(h)(2).

The posture of this case is therefore similar to review of a ruling on motion to dismiss for failure to state a claim. This Court reviews district court rulings on motions to dismiss for "correction of errors at law," considering the well-pled facts in the petition, and viewing those facts "in the light most favorable to the plaintiff with doubts resolved in that party's

favor." Geisler v. City Council of City of Cedar Falls, 769 N.W.2d 162, 165 (Iowa 2009) (internal citation omitted).

By analogy this Court may answer the Certified Questions on a similar basis here.

II. IN RESPONSE TO CERTIFIED QUESTION 1 THIS COURT SHOULD HOLD THAT DRAINAGE DISTRICT IMMUNITY DOES NOT APPLY TO DAMAGES CLAIMS IN A CASE INVOLVING WATER POLLUTION

Certified Question 1 has been preserved and is properly presented for review because it was raised, briefed, and argued to the District Court, (App. 110-178), and was properly certified to this Court pursuant to Iowa Code Ch. 684A, (App. 294-319). Review is to answer the question of law as certified. Iowa Code § 684A.1.

This Court should reconsider the immunity doctrine exemplified by Fisher v. Dallas County, 369 N.W.2d 426 (Iowa 1985) as applied to this case. Drainage districts have to date enjoyed a judicially created, unqualified immunity[2] from claims for damages. However, such immunity from

[2] DMWW refers to the doctrine described in Fisher as unqualified immunity even though the Court has occasionally characterized such immunity as a lack of "juristic" capacity. See Fisher, 369 N.W.2d at 429. However, the Court has also concluded that a drainage district is a "juristic entity." State ex rel. Iowa Emp't Sec. Comm'n v. Des Moines Cnty., 149 N.W.2d 288, 290-291 (Iowa 1967). Reconciliation of these two uses of the term "juristic" leads to the conclusion that in Fisher the Court used the term "juristic" as a

damages has not been analyzed in a pollution case or in light of current circumstances, which include significant changes to the Iowa Constitution and the ongoing development of Iowa law since the immunity was first established.

The doctrine of drainage district immunity is ripe for reconsideration, both generally, and in the context of this case, because when the reasons for immunity are no longer sound the immunity should end. Haynes v. Presbyterian Hosp. Ass'n, 45 N.W.2d 151, 154 (Iowa 1950); see also Koenig, 766 N.W.2d at 645. Alternatively, possible limitations on, or qualifications to, the scope of the immunity should be considered as applicable to the claims of this case.

The responsibility for addressing change to drainage district immunity rests with this Court, not the legislature, because the doctrine is not expressly stated in any statute, but rather was Court created in the first place. See Fisher, 369 N.W.2d at 429 ("This principle has circumscribed the cases in which *we* have allowed drainage districts to exist as juristic entities.")

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synonym for immunity. See Chicago Cent. & Pac. R.R. Co. v. Calhoun Cnty. Bd. of Sup'rs, 816 N.W.2d 367, 374 (Iowa 2012) ("A drainage district's *immunity* is not based on the doctrine of sovereign immunity . . . .") (emphasis added); see also Global Mail Ltd. v. United States Postal Serv., 142 F.3d 208, 216 (4th Cir. 1998) (citing Eighth Circuit authority to explain that absent sovereign immunity waiver an agency is not a "juristic person").

(emphasis added).

Having created the doctrine, the Court also has the authority to abrogate or limit it. Lee v. State, Polk Cnty. Clerk of Court, 815 N.W.2d 731, 737-38 (Iowa 2012) ("We recognized immunity in our state courts was 'judicially created,' and as a result, the rule could be 'judicially renounce[d].'") (internal citations omitted); Turner v. Turner, 304 N.W.2d 786, 787 (Iowa 1981) ("When a rule is of judicial origin, it is subject to judicial change."); Kersten Co., Inc. v. Dep't of Soc. Servs., 207 N.W.2d 117, 119 (Iowa 1973) ("We closed our courtroom doors without legislative help, we can likewise open them.") (internal citation omitted).

Since the Court created the immunity doctrine, there has been an accumulation of doctrinal changes, and changes in circumstances, that fundamentally undermine the rationale for the immunity. "An appellate court would be remiss in its duties if it did not from time to time re-examine the analysis underlying its precedents." Shook v. Crabb, 281 N.W.2d 616, 617 (Iowa 1979). Drainage district immunity should have no applicability in this case because: (A) the history of the immunity does not support its application to these facts; (B) the immunity should not survive the grant of home rule authority by amendment to the Iowa Constitution; (C) the public health presumption in favor of drainage upon which the immunity is partly

based is rebutted under the facts of this case; (D) the Court has developed an unfavorable view of unqualified immunities; (E) many other similar states do not provide unqualified immunity to drainage districts; and (F) the immunity, if applied here, would violate the Iowa Constitution.

These considerations, individually and collectively show that drainage district immunity should be re-examined and either overturned or limited.

A. History Does Not Support Application of Immunity to This Case

Drainage district immunity is an artifact of a different scientific, economic, legislative, and judicial era. To understand this, it is necessary first to understand the genesis of the doctrine. N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349, 41 S. Ct. 506, 507, 65 L. Ed. 963 (1921) ("Upon this point a page of history is worth a volume of logic."). Hence, DMWW will begin with a brief review of relevant history.

The history of Iowa agricultural drainage goes back to the nineteenth century. (App. 19-21 ¶¶ 109-115). As noted in Polk County Drainage District Four v. Iowa Natural Resources Council, 377 N.W.2d 236, 241 (Iowa 1985), "the General Assembly enacted our drainage legislation about a century ago, mainly to render wetlands tillable for agricultural purposes. Iowa Code title X, ch. 2 (1873)." Originally grouped in Title X of the Iowa Code with other development enterprises described in the argot of the times

as "internal improvements," Iowa law has from earliest times tied construction of public drainage infrastructure to findings of "public health, convenience and welfare." See, e.g., Iowa Code § 1207 (1873).

Later, the idea of distinct drainage districts took hold, and in 1904 the 30th Regular Session of the Iowa General Assembly provided a detailed scheme for the formation and financing of drainage districts. 30 G.A. Chs. 67 & 68 (1904). Incorporating the public health rationale, the formation of drainage districts was to be predicated on findings to be made by county boards of supervisors that such districts would be "of public utility or conducive to the public health, convenience and welfare, and the drainage of surface waters[3] from surface lands shall be considered a public benefit and conducive to the public health, convenience, utility and welfare." 30 G.A. Ch. 68, § 1, codified at § 1989a1, Iowa Code Supplement (1907).

One of the purposes of the new scheme was to overcome constitutional infirmities in the methods used to create and finance the improvements. See Beebe v. Magoun, 97 N.W. 986, 987 (Iowa 1904), as explained in Canal Const. Co. v. Woodbury Cnty., 121 N.W. 556 (Iowa 1909); see generally Ivan L. Pollock, History of Economic Legislation in

[3] More recently the function of drainage has been expanded to include the lowering of groundwater to improve crop yields. (App. 20 ¶¶ 110-113).

Iowa at 92-93 (St. Hist. Soc'y of Iowa 1918) (noting that the 1904 Act "was comprehensive and was so drafted as to include the desirable provisions of the previous laws and at the same time be free from constitutional objections.").

A subsequent challenge to the constitutionality of the legislative direction for the formation of drainage districts was rejected by this Court in 1905 with the Court recognizing drainage district creation as a proper exercise of legislative power delegated to the boards of supervisors. Sisson v. Bd. of Sup'rs of Buena Vista Cnty., 104 N.W. 454, 461 (Iowa 1905). Lest there be any doubt as to the matter, in 1908, Art. I, § 18 of the Iowa Constitution, governing eminent domain, was amended by adding a specific exception and authorization for drainage districts as follows:

> The general assembly, however, may pass laws permitting the owners of lands to construct drains, ditches, and levees for agricultural, sanitary or mining purposes across the lands of others, and provide for the organization of drainage districts, vest the proper authorities with power to construct and maintain levees, drains and ditches and to keep in repair all drains, ditches, and levees heretofore constructed under the laws of the state, by special assessments upon the property benefited thereby. The general assembly may provide by law for the condemnation of such real estate as shall be necessary for the construction and maintenance of such drains, ditches and levees, and prescribe the method of making such condemnation.

Iowa Const. Art. I, § 18.

Later cases characterized the Sisson rule as based on the exercise of

the "police power." Mason City & Ft. D.R. Co. v. Bd. of Sup'rs of Wright Cnty., 121 N.W. 39, 40 (Iowa 1909); Hatcher v. Bd. of Sup'rs of Greene Cnty., 145 N.W. 12, 13 (Iowa 1914). This characterization was important because it allowed the court to deny compensation for various kinds of resulting injury. As explained in Bd. of Sup'rs of Wright County*:*

> Drainage within the contemplation of the above statute is for public use, convenience, and welfare, and, this being so, the making of the improvement is within the police power of the state, and injury such as here claimed, being merely incidental thereto, cannot be regarded as the taking of property within the contemplation of the Constitution.

121 N.W. at 40 (internal citation omitted).

The "shall be considered a public benefit and conducive to public health" formula was restated as a presumption in 1923 by 40 Ex GA Ch. 126 § 1. This presumption was codified at Iowa Code § 7422 (1924) and remains in the statute today at Iowa Code § 468.2 (2015). This presumption has been a fundamental basis for the law governing drainage, but has been unexamined and unchallenged for over a century.

At the beginning of the last century, the public health benefits of draining swamplands would have seemed self-evident and supported by the available science. Moreover, such benefits would not yet have been tempered by environmental concerns for resulting water pollution. See Polk Cnty. Drainage Dist. Four, 377 N.W.2d at 241 (noting the enactment of

water resource legislation some 75 years after the enactment of drainage district laws). Certainly, the current problem of nitrate pollution as a threat to drinking water safety was not foreseen.[4] It is time to re-examine that presumption as to water quality impacts, and this case presents the opportunity.

In addition to the presumption based on public health and welfare, there was an additional thread from which the idea of immunity evolved, based on the nature of drainage districts, their powers, and the relationship to boards of supervisors. The earliest case seems to be Dashner v. Mills County, 55 N.W. 468, 469 (Iowa 1893), which denied money damages to a landowner harmed by a county's failure to maintain a ditch based on the idea that ditches were not a general obligation of the county. Clary v. Woodbury County, 113 N.W. 330, 332-33 (Iowa 1907), reflects the early view of claims against drainage districts. In Clary, this Court found no responsibility for downstream "overflow" (flooding) outside the county because (1) the drainage district involved was not an entity, and (2) the board of supervisors had nearly unlimited power to create drainage districts, but only limited

[4] By way of comparison, pollution from sewage disposal was understood as a problem at the time, and municipal liability was imposed for it. Vogt v. City of Grinnell, 110 N.W. 603, 603 (Iowa 1907); Boyd v. City of Oskaloosa, 161 N.W. 491 (Iowa 1917).

powers to implement them. 113 N.W. 330.

From Clary forward there are numerous cases denying relief in tort and for monetary claims generally. See, e.g., Canal Const. Co., 121 N.W. 556; Miller v. Monona Cnty., 294 N.W. 308, 310-11 (Iowa 1940); Fisher, 369 N.W.2d 426; Gard v. Little Sioux Intercounty Drainage Dist. of Monona and Harrison Cntys., 521 N.W.2d 696 (Iowa 1994); Calhoun Cnty. Bd. of Sup'rs, 816 N.W.2d 367.

The gravamen of the case law that emerged at the beginning of the twentieth century, and remained essentially unchanged ever since, was a judicially created doctrine of immunity from money claims, not based on any explicit statutory immunity and not based on the doctrine of sovereign immunity, but rather based on concepts of (1) limited existence and (2) limited powers in pursuit of presumed benefit to public health and welfare. See Calhoun Cnty. Bd. of Sup'rs, 816 N.W.2d at 374 ("A drainage district's immunity is not based on the doctrine of sovereign immunity; instead, it flows from the fact that a drainage district is an entity with 'special and limited powers and duties conferred by the Iowa Constitution.'") (internal citation omitted).

Despite continued immunity, the idea that drainage districts had no corporate existence was modified in the context of funding contributions to

IPERS and Social Security. In State ex rel. Iowa Employment Security Commission v. Des Moines County, 149 N.W.2d at 291, the Court held:

> Counties are political subdivisions of the state. And an organized drainage district is a political subdivision of the county in which it is located, its purpose being to aid in the governmental functions of the county. It is a legally identifiable political instrumentality.
>
> We conclude drainage districts come within the classification of a political subdivision or instrumentality of the state, or one of its political subdivisions or instrumentalities.

(internal citation omitted).

The rule of immunity from damages persisted unexamined, and unchanged, and even survived the enactment of a municipal tort claims act that would have seemed by its precise statutory text to cover all "political subdivisions" without express exclusion for drainage districts. Fisher carved out a judicially implied exception to the otherwise quite comprehensive tort reform enacted in 1971 which is now codified at Iowa Code Chapter 670 (then codified at Iowa Code Ch. 613A). Fisher, 369 N.W.2d 426.

This history demonstrates that drainage district immunity was judicially created at an early stage of the development of the state and has been generally applied since without much critical analysis.

Certified Question 1 should be answered to permit DMWW's claims for damages to proceed because history does not support application of

immunity to this case.

B. County Home Rule Undermines the Immunity Rationale

The doctrine of drainage district immunity is predicated in part upon the concept that drainage districts have only limited powers expressly granted by statute. Fisher, 369 N.W.2d 426 ("The limited nature of a drainage district's purposes and powers are, therefore, reflected in the limited circumstances in which a drainage district is subject to suit.").

Although, this concept has been carried forward from the earliest cases concerning drainage systems, it is impossible to square these cases today with the grant of county home rule in 1978. Iowa Const. Art. III, § 39A. It is particularly hard to reconcile the rationale set forth in Fisher with the text of § 39A:

> The proposition or rule of law that a county or joint county-municipal corporation government possesses and can exercise only those powers granted in express words *is not a part of the law of this state*.

Iowa Const. Art. III, § 39A (emphasis added). The effect of § 39A was to abrogate the previously entrenched "Dillon Rule" first announced in City of Clinton v. Cedar Rapids & Mo. River R.R. Co., 24 Iowa 455, 475 (1868); cf. Berent v. City of Iowa City, 738 N.W.2d 193, 196 (Iowa 2007).

The amendment to the Iowa Constitution granting counties home rule authority, and a corresponding amendment for municipalities, Iowa Const.

Art. III, § 38A, mean that political subdivisions in Iowa have "self-executing" authority. Sam F. Scheidler, Survey of Iowa Law: Implementation of Constitutional Home Rule in Iowa, 22 Drake L. Rev. 294, 304 (1973). This "self-executing" authority is a change from the past state of the law:

> The grant of home rule power combined with a repudiation of Dillon's Rule would appear to mean that cities were given the power to act in certain areas without the need for statutory grants of authority from the legislature.

Id.; Polk Cnty. Bd. of Sup'rs v. Polk Commw. Charter Comm'n, 522 N.W.2d 783, 791 (Iowa 1994).

The demise of the Dillon Rule means that political subdivisions are now presumed to have authority to act, whereas under the Dillon Rule the presumption was that political subdivisions could not act. Political subdivisions enjoy freedom to act outside the boundaries of their statutes unless circumscribed[5] by the limited conditions contained in Iowa Const.

[5] There are narrow limitations on the exercise of political subdivision authority. They cannot "levy any tax unless expressly authorized by the general assembly" or exercise power in a way that is "inconsistent with the laws of the general assembly . . . ." Iowa Const. Art. III, §§ 38A, 39A. An action is inconsistent with law when it (1) permits an act prohibited by statute, (2) prohibits an act permitted by statute, or (3) invades a regulatory area the state has reserved for itself. Goodell v. Humboldt Cnty., 575 N.W.2d 486, 492-93 (Iowa 1998); see also Iowa Code § 331.301(4) ("An exercise of county power is not inconsistent with state law unless it is

Art. III, §§ 38A, 39A.

This freedom and the existence of expanded powers is completely at odds with the rationale of drainage district immunity based on limited powers. Thus, the immunity should be re-examined and modified to fit the current case.

Drainage districts are political subdivisions of counties generally governed by a board of supervisors. See, e.g., Voogd v. Joint Drainage Dist. No. 3-11, 188 N.W.2d 387, 393 (Iowa 1971) ("[D]rainage districts are political subdivisions of the counties"); State ex rel. Iowa Emp't Sec. Comm'n, 149 N.W.2d at 291. ("[A]n organized drainage district is a political subdivision of the county in which it is located, its purpose being to aid in the governmental functions of the county. It is a legally identifiable political instrumentality."). The county boards of supervisors have authority to establish and construct drainage districts and to control and supervise the infrastructure once a drainage district has been established. Iowa Code §§ 468.1, 468.500. Home rule thus extends to drainage districts as political subdivisions of the county. Therefore, the appropriate home rule analysis as applied here is whether pollution control is within the purview of local

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irreconcilable with state law."); Iowa Code § 331.301(6)(a) ("A county . . . may set standards and requirements which are higher or more stringent than those imposed by state law . . . .").

affairs and government, and is consistent with the laws of the general assembly. See, e.g., Goodell, 575 N.W.2d at 492; 1998 Iowa Op. Att'y Gen. 98-7-6, 1998 WL 698398 (July 28, 1998) (discussing whether a proposed county ordinance regulating manure lines crossing drainage districts represents a valid exercise of drainage district authority under Iowa Const. Art. III, § 39A).

Although Drainage Districts contend their "powers are extremely limited," (App. 114), and that they cannot control other things such as "landowners' use or management of their properties," (App. 114), these assertions overstate the case. Drainage districts have various express powers, see, e.g., Iowa Code § 468.128 (authority to construct erosion control improvements); Iowa Code § 468.150 (authority to recoup expenses for abating nuisance on private lots); Iowa Code § 468.130 (authority to discharge with city, treated sewage); Iowa Code § 468.128 (authority to construct flood and erosion control devices and acquire lands), but drainage districts also have the benefit of home rule to take other steps. See, e.g., 1980 Iowa Op. Att'y Gen. 631, Op. No. 80-3-13, 1980 WL 25947 (March 13, 1980); 1979 Iowa Op. Att'y. Gen 54, Op. No. 79-4-7, 1979 WL 20913 (April 6, 1979).

No Iowa case dealing with drainage district immunity mentions Iowa

Const. Art. III, § 39A. Fisher cited Iowa Const. Art. I, § 18, but did not address county home rule. It seems the parties did not raise Iowa Const. Art. III, § 39A. See Fisher, 369 N.W.2d 426. Given the central role of limited powers in supporting the doctrine of immunity, this is a significant omission.

When the reason for a rule ends so should the rule. The limited powers rationale of the immunity rule has been largely, if not entirely, undermined by home rule, and so such immunity should be re-examined, and overturned or limited.

Certified Question 1 should be answered to permit DMWW's claims for damages to proceed because home rule undermines the immunity rationale.

C. The Facts Alleged Rebut the Public Health Presumption that Underlies Immunity

The judicially created doctrine of drainage district immunity is also fundamentally intertwined with the idea that agricultural drainage promotes public health, but no court has analyzed the doctrine in a case where a contrary public health interest is alleged. There are, to be sure, cases from earliest times that address flow effects of drainage. See, e.g., Miller, 294 N.W. at 310-11, but DMWW's research has revealed no Iowa case where the public health impact of pollution from drainage district activity has been considered, and it believes the precise issue here is one of first impression.

This does not mean that Iowa cases have never considered liability for river pollution. It is interesting to compare the holding in Miller to the holding of an earlier case, Vogt v. City of Grinnell, 110 N.W. 603, 603 (Iowa 1907); see, also, Boyd, 161 N.W. 491. In Miller, the court held that a drainage district could not create a nuisance, "while operating within the ambit of powers constitutionally delegated." 294 N.W. at 311. However in Vogt, the court held a city liable for pollution from sewage discharge. 110 N.W. 603. What was the basis for the difference in Miller and Vogt? DMWW submits it was the distinction between the overflow impacts considered in Miller versus the sanitation issues in Vogt. These cases suggest that, when the immunity doctrine was being developed, flow issues were considered an acceptable price of progress in the exercise of police powers, whereas a line was drawn at sewage pollution.

Today's public health concerns go to the heart of, and negate the basis of, the immunity rule when considering a pollution case. This analysis applies for several reasons despite the health and public welfare "presumption" set forth at Iowa Code § 468.2(1).

First, the statutory presumption here dates back to 1873, or 1924 at the latest. Times have changed. There has been a radical change in our scientific understanding and in the nature of the impact of drainage. (App. 7-9 ¶¶ 32-

44). There has been a shift in our concern for environmental impacts. See Polk Cnty. Drainage Dist. Four, 377 N.W.2d at 241 (discussing the history of Iowa's environmental laws). There has also been a fundamental shift in the balancing of property and human rights. Alexander v. Med. Assocs. Clinic, 646 N.W.2d 74, 84 (Iowa 2002) ("A final reason for abolishing the distinction [in favor of property owners] is that our modern social mores and humanitarian values place more importance on human life than on property.").

Second, the legislative presumption in § 468.2(1) is an inference not a fact. Ezzard v. U.S., 7 F.2d 808, 810 (8th Cir. 1925) ("A presumption is an inference as to the existence of a fact not actually known, arising from its usual connection with another which is known.") (internal citation omitted).

Finally, a presumption is generally rebuttable. Fresh v. Gilson, 41 U.S. 327, 331, 10 L. Ed. 982 (1842) ("[P]resumptions . . . must give place, when in conflict with clear, distinct and convincing proof."); Western & A. R.R. v. Henderson, 279 U.S. 639, 642, 49 S. Ct. 445, 447, 73 L. Ed. 884 (1929) ("Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property.")

This is not to say that the public health presumption of § 468.2 has no meaning or effect. To the contrary, the presumption has been a basis for the

immunity doctrine founded on the exercise of the police power. However, the immunity doctrine should not apply in a case where the presumption is rebutted, as it is here, because a threat to public health is shown. The police power can justify many things, but it has limits. Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168, 176 (Iowa 2004). At the least, exercise of the police power to protect public health should not immunize conduct detrimental to public health.

Although the public health issues raised by this case cast doubt on the immunity doctrine generally, this Court need not limit the doctrine here beyond the boundaries of DMWW's claims. Certainly a doctrine allowing damage claims in matters affecting public health could be fashioned without overturning the mass of precedent that might otherwise remain in other kinds of cases.

Certified Question 1 should be answered to permit DMWW's claims for damages to proceed because DMWW's claims rebut the Drainage Districts' presumption of benefit to public health.

D. The Court Disfavors Absolute Immunities

Since the genesis of drainage district immunity the Court has increasingly taken an unfavorable view of judicially created immunities, and has repeatedly abolished or circumscribed them. "The law's emphasis

generally is on liability, rather than immunity, for wrongdoing." Haynes, 45 N.W.2d at 154.

The history of the Court's jurisprudence is replete with immunities that have either been abolished or circumscribed. E.g., Dalarna Farms v. Access Energy Coop., 792 N.W.2d 656, 663-664 (Iowa 2010) (limiting application of a statutory comparative fault to avoid constitutional doubts); Galloway v. State, 790 N.W.2d 252, 258 (Iowa 2010) (invalidating parental pre-injury waiver for children); Gacke, 684 N.W.2d at 178-79 (invalidating immunity for special damages); Bormann v. Bd. of Sup'rs in and for Kossuth Cnty., 584 N.W.2d 309, 319-20 (Iowa 1998) (limiting immunity for creation of a permanent nuisance); Goetzman v. Wichern, 327 N.W.2d 742, 753 (Iowa 1982) (adopting comparative negligence); Turner, 304 N.W.2d at 789 ("[U]nemancipated minor children are not barred by the immunity doctrine from suing their parents for negligence torts."); Bierkamp v. Rogers, 293 N.W.2d 577, 585 (Iowa 1980) (holding Iowa's guest statute unconstitutional); Shook, 281 N.W.2d at 620 ("We therefore abrogate the doctrine of interspousal immunity. . . ."); Kersten Co., 207 N.W.2d at 122 (abolishing immunity for the state when it enters into a contract); Stuart v. Pilgrim, 74 N.W.2d 212, 216 (Iowa 1956) (invalidating rule imputing contributory negligence to car passenger); Haynes, 45 N.W.2d at 154

(abolishing charitable institution immunity for employee conduct).

The Court has relied upon evolving understandings of public policy concerns when invalidating immunities. Galloway, 790 N.W.2d. at 255. The Court has rejected immunities based on common law fictions. Shook, 281 N.W.2d at 618. The Court has found absolute immunities are both over and under inclusive. Bierkamp, 293 N.W.2d at 584. The Court has concluded that *stare decisis* alone is an insufficient reason to perpetuate an outmoded immunity doctrine. Kersten Co., 207 N.W.2d at 121.

The Court's history of avoiding the harsh consequences of absolute immunities weighs in favor of re-examining, and overturning or limiting, drainage district immunity as applied here.

Certified Question 1 should be answered to permit DMWW's claims for damages to proceed because drainage district immunity is inconsistent with modern law.

E. Iowa Drainage District Immunity Is an Anomaly Among Similar States

Iowa is not the only state to provide a statutory scheme for the establishment of agricultural drainage infrastructure. However, Iowa appears to be out of step with the approach of other Midwestern jurisdictions to drainage district liability.

Unlike Iowa, many Midwestern and Mississippi River states apply municipal tort claim statutes to drainage districts. See, e.g., Parriott v. Drainage Dist. No. 6 of Peru, 410 N.W.2d 97, 99-100 (Neb. 1987); Dougan v. Rossville Drainage Dist., 757 P.2d 272, 279 (Kan. 1988); Landview Landscaping, Inc. v. Minnehaha Creek Watershed Dist., 569 N.W.2d 237, 240 (Minn. Ct. App. 1997); Roark v. Macoupin Creek Drainage Dist., 738 N.E.2d 574, 579-80 (Ill. App. Ct. 2000); Gerbers, Ltd. v. Wells Cnty. Drainage Bd., 608 N.E.2d 997, 1000 (Ind. Ct. App. 1993); Lezina v. Fourth Jefferson Drainage Dist., 190 So. 2d 97, 100 (La. Ct. App. 1966); Kilburn v. Fort Bend Cnty. Drainage Dist., 411 S.W.3d 33, 37 (Tex. App. 2013); Holytz v. City of Milwaukee, 115 N.W.2d 618, 625 (Wis. 1962) superseded by statute as recognized by Milwaukee Metro. Sewerage Dist. v. City of Milwaukee, 691 N.W.2d 658, 665 (Wis. 2005) (noting the adoption of statute codifying immunity for discretionary functions). Arkansas takes a contrary approach and grants immunity for actions in tort against so-called "improvement districts." St. Francis Drainage Dist. v. Austin, 296 S.W.2d 668, 671 (Ark. 1956). However, the bar to tort claims does not extend to injunctive relief, id., or constitutional takings claims, Ark. State Highway Comm'n v. Steed, 411 S.W.2d 17, 21 (Ark. 1967).

The Court has previously relied upon other jurisdictions in eliminating or tailoring immunities. Galloway, 790 N.W.2d at 256; Shook, 281 N.W.2d at 618; Haynes, 45 N.W.2d at 154.

DMWW requests the Court consider the approach of other jurisdictions that hold drainage districts accountable for the consequences of drainage.

Certified Question 1 should be answered to permit DMWW's claims for damages to proceed because Iowa is inconsistent with other similar jurisdictions.

F. Application of Immunity to Defeat All of DMWW's Claims Would Be Unconstitutional

Drainage district immunity should either be abolished or limited as applied to DMWW's claims because such immunity denies (1) equal protection, (2) due process (3) just compensation for a government taking, and (4) inalienable rights under the Iowa Constitution.[6]

[6] Certified Question 3 presents the question of whether DMWW has any Iowa Constitutional rights that it may assert in this case. This division of the Brief assumes the constitutional infirmities of drainage district immunity doctrine as applied to this case can be considered by the Court either by reason of an affirmative answer to the question of Certified Question 3, or by application of a rule of construction that the law of the state should be construed and applied to avoid constitutional doubt. Dalarna Farms, 792 N.W.2d at 663-64.

1. Immunity denies equal protection as applied to this case.

Immunities that separate classes and deny a remedy to a class are disfavored. Turner, 304 N.W.2d at 788 ("Whenever we set a class of people apart, tell them they are unlike other people and deny to them the process of the law we violate a strongly felt need for equal treatment.") (quoting Barlow v. Iblings, 156 N.W.2d 105, 114 (Iowa 1968) (Becker, J., dissenting)).

The standards for equal protection analysis under the Iowa Const. Art. I, § 6 and Art. III, § 30 are well settled. Equal protection analysis requires identification of classifications, and application of rational basis or strict scrutiny review. Varnum v. Brien, 763 N.W.2d 862, 879-80 (Iowa 2009). Both levels of scrutiny apply here.

Strict scrutiny means that whenever "a classification 'impinge[s] upon the exercise of a fundamental right,' the Equal Protection Clause requires 'the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.'" Rosenbrahn v. Daugaard, 61 F. Supp. 3d 845, 859 (D.S.D. 2014) (quoting Plyler v. Doe, 457 U.S. 202, 216-17, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982)); see also King v. State, 818 N.W.2d 1, 25-26 (Iowa 2012).

As matter of Iowa law, DMWW has riparian property rights because

DMWW owns real estate adjacent to the Raccoon River. Robert's River Rides, Inc. v. Steamboat Dev. Corp., 520 N.W.2d 294, 299-300 (Iowa 1994) abrogated on other grounds by Barreca v. Nickolas, 683 N.W.2d 111, 119 (Iowa 2004). One of DMWW's riparian rights is the right to clean, unpolluted water within the Raccoon River. Freeman v. Grain Processing Corp., 848 N.W.2d 58, 67 (Iowa 2014) (citing Bowman v. Humphrey, 109 N.W. 714, 714-15, 717 (Iowa 1906)).

DMWW is constitutionally guaranteed just compensation for the Drainage Districts' deprivation of DMWW's property right to unpolluted water. Iowa Const. Art. I, § 18. Such constitutional guaranty is a fundamental right. King, 818 N.W.2d at 26 ("Fundamental rights are generally those explicitly or implicitly contained in the Constitution.").

Since drainage district immunity creates a classification scheme that affects DMWW's fundamental right to just compensation, strict scrutiny is appropriate. Varnum, 763 N.W.2d at 880.

To survive strict scrutiny analysis, the immunity must be supported by a compelling reason for prohibiting DMWW from asserting its constitutional rights, and the immunity must be narrowly tailored to achieve that end. Id. Drainage Districts cannot meet the heavy burden imposed by strict scrutiny because there is no *compelling* government interest that can only be served

by a total bar to DMWW suing another political subdivision, even a Drainage District, for a violation of a constitutional right. Therefore, at least as applied to DMWW's claim for taking without just compensation, the immunity is unconstitutional.

Drainage district immunity, as more generally applied to defeat DMWW's other pollution claims, also creates a classification scheme of a kind that has often been the subject of rational basis scrutiny on equal protection grounds—differentiation between classes of tort victims. See, e.g., Bierkamp, 293 N.W.2d at 585 (automobile guests versus non-guests); Miller v. Boone Cnty. Hosp., 394 N.W.2d 776, 776-77 (Iowa 1986) (restrictive limitation provisions in government subdivision tort law). The question here is whether it is proper to single out the narrow class of drainage district tort victims from all other tort victims, or perhaps even all other victims of torts by governmental subdivisions.

This Court applies a more searching form of rational basis review than federal courts do in applying the United Sates Constitution. Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1 (Iowa 2004), cert. denied 541 U.S. 1086 (2004) ("RACI"), on remand from Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103, 123 S. Ct. 2156, 156 L. Ed. 2d 97 (2003); see also Johnson v. Univ. of Iowa, 408 F. Supp. 2d 728, 749-51 (S.D. Iowa

2004) affirmed 431 F.3d 325 (8th Cir 2005).

The Court has previously upheld drainage district immunity in the face of an equal protection challenge on rational basis review in a wrongful death case. Gard, 521 N.W.2d at 698-699. Gard upheld the immunity doctrine based on a finding of rational basis because of the special character granted to drainage districts by the Court. Id. at 699. However, Gard never considered whether the adoption of county home rule changed the Court's understanding of the nature of drainage districts. Gard also did not involve the public health considerations presented here. Further, Gard was decided in 1994—10 years before RACI. Gard's application of rational basis is difficult to square with the development of more searching rational basis review.[7]

Application of Iowa's rational basis review post-RACI requires an understanding of the rights protected by the Equal Protection Clause. The Court has previously cited a history of state constitution equal protection clauses that explains:

> [E]quality provisions were included in state constitutions "*after a series of abuses by the relatively unfettered state legislatures*

[7] The Court has recognized that "continual reexamination of rationales and principles" is necessary when construing a constitution. Boone Cnty. Hosp., 394 N.W.2d at 780-81 (quoting Hunter v. North Mason High Sch., 539 P.2d 845, 851 (Wash. 1975)).

> *responding to powerful economic interests*." Id. at 1207. According to this writer, "[t]hey reflect the Jacksonian opposition to favoritism and special treatment for the powerful." Id. He concludes an equality provision "does not seek equal protection of the laws at all. Instead, it prohibits legislative discrimination in favor of a minority."

RACI, 675 N.W.2d at 5 n.2 (quoting Robert F. Williams, Equality Guarantees in State Constitutional Law, 63 Tex. L. Rev. 1195, 1207-08 (1985)) (emphasis added).

At a minimum, equal protection means avoiding special treatment and favoritism for the economically powerful. With this purpose in mind, the analysis shifts to rational basis review of drainage district immunity.

To survive rational basis review the classification at issue must be reasonable in light of its purpose. RACI, 675 N.W.2d at 7. Drainage district immunity fails this test. In addition to the generally problematic issue of discriminating among tort victims without sufficient reason, immunity as applied to this case is irrational for numerous other reasons: (1) a false presumption of promotion of public health; (2) an outmoded understanding of the authority of drainage districts; (3) a failure to consider the harmful environmental consequences of unregulated drainage; (4) an allowance, indeed promotion, of the export of negative environmental impacts of agriculture downstream; (5) the treatment of other polluters, including other municipal and private entities unfavorably while protecting the largest

nitrate polluters from responsibility; (6) the protection of narrow interests at the cost of perpetuating a great public injury; (7) a total exculpation of responsibility, not narrowly tailored to achieve its ends; and (8) perpetuation of an immunity that is not necessary in order to have an adequate and effective system of drainage, see, e.g., Parriott, 410 N.W.2d 97; Dougan, 757 P.2d 272.

Drainage district immunity, as applied here, denies equal protection under the Iowa Constitution.

2. Immunity denies due process as applied to this case.

Drainage district immunity as applied here also deprives DMWW of due process guaranteed by Iowa Const. Art. I, § 9. As explained in City of Sioux City v. Jacobsma, 862 N.W.2d 335, 339-40 (Iowa 2015) there are two separate but related due process concepts:

> The first, generally referred to as substantive due process, prevents government from "interfer[ing] with rights 'implicit in the concept of ordered liberty.'" The second concept is procedural due process. Procedural due process requires a government action impinging upon a protected interest to be implemented in a fair manner.

(internal citations omitted).

Both the substantive and procedural due process guarantees of the Iowa Constitution are violated by drainage district immunity.

a. Immunity denies substantive due process.

Substantive due process protects against interference with fundamental "rights implicit in the concept of ordered liberty." Id. at 339 (internal quotations omitted), but also protects other property rights as well. Id. at 340.

As previously argued, the constitutional right to just compensation for takings is a fundamental right. A less fundamental, but still vital right is the legal protection of the riparian right to clean water. Ferguson v. Firmenich Mfg. Co., 42 N.W. 448, 449 (Iowa 1889); Spence v. McDonough, 42 N.W. 371, 372 (Iowa 1889). The Court should apply the due process clause to limit drainage district immunities that deny any right to recover for takings or other damages for pollution.

The Court has applied a two-step analysis in determining whether a particular action violates substantive due process. First, the Court determines whether the right at issue is fundamental. Hensler v. City of Davenport, 790 N.W.2d 569, 580 (Iowa 2010). Second, the Court applies the appropriate scrutiny—strict scrutiny for fundamental rights and rational basis for every other right. Id.

Since the right to just compensation is fundamental, any denial of such right for a taking requires strict scrutiny. Id. DMWW can see no

compelling reason for the Drainage Districts to have total immunity from a constitutional obligation to compensate DMWW for takings. Indeed, even if such immunity applies generally, it could certainly be found inapplicable to a takings claim to avoid constitutional doubts and to vindicate DMWW's constitutional right to just compensation.

The immunity also denies DMWW its right to obtain any redress for harm caused by nitrate pollution. While not a fundamental right, DMWW's right to a remedy for pollution is a right that cannot be denied without a rational basis. The Court has historically "found it important in substantive due process analysis to consider whether the effect of a [law] is 'to give an injured person, in essence, no right of recovery.'" Gacke, 684 N.W.2d at 179 (quoting Shearer v. Perry Cmty. Sch. Dist., 236 N.W.2d 688, 692 (Iowa 1975), overruled on other grounds by Boone Cnty. Hosp., 394 N.W.2d at 781).

Application of Iowa's more searching rational basis review to the denial to DMWW of all right to a claim for water pollution leads to the conclusion that the immunity is unconstitutional. Immunity violates due process when it prevents all recovery of damages for an injury. Gacke, 684 N.W.2d at 179; Shearer, 236 N.W.2d at 692.

Drainage has been encouraged by the immunity doctrine to export its

pollution costs downstream without concern for consequences. Drainage district immunity as applied to pollution is self-defeating because it allows for an unsustainable condition to exist and to grow without check or limit. The conflict between water pollution and a safe water supply is as old as civilization itself, but the need for clean water should take precedence over the convenience of unrestrained pollution by drainage districts. Eugene Davis, Water Rights in Iowa, 41 Iowa Law Rev. 216, 225-26 (1956) ("Davis") (explaining "artificial" uses of water are subordinate to "natural" uses). Cities have been, and are required to, control and treat pollution and have never been immune from pollution claims. Vogt, 110 N.W. 603. Drainage districts can also surely meet clean water obligations to those downstream.

b. Immunity denies procedural due process.

Drainage district immunity also denies the right to procedural due process. Procedural due process "requires government action impinging upon a protected interest to be implemented in a fair manner." Jacobsma, 862 N.W.2d at 340. The due process clause's essential guarantee is "that before there can be a deprivation of a protected interest, there must be notice and opportunity to be heard in a proceeding that is adequate to safeguard the right[s] . . . ." Bowers v. Polk Cnty. Bd. of Sup'rs, 638 N.W.2d 682, 690-91

(Iowa 2002) (internal quotations omitted).

The first step in a procedural due process analysis is to identify the interest infringed. Id. at 691. Second, the analysis shifts to focus on the process required. Owens v. Brownlie, 610 N.W.2d 860, 870 (Iowa 2000).

As previously explained, DMWW has a right to redress for pollution within the Raccoon River. Bowman, 109 N.W. at 715; Davis at 220-29. Before DMWW is deprived of this right, it is entitled to process.

The determination of the appropriate process involves consideration of several factors:

> (a) the private interests implicated; (b) the risk of an erroneous determination by reason of the process accorded and the probable value of added procedural safeguards; and (c) the public interest and administrative burdens, including costs that the additional procedure would involve.

Owens, 610 N.W.2d at 870. In this case, application of the drainage district immunity will bar DMWW from adjudicating its claims for damages. This is a total absence of process.

Further, denying DMWW all redress because of a presumption that drainage is always in the interest of public health is an archetypical denial of due process. Hensler, 790 N.W.2d at 586 ("A presumption in a civil case violates the Due Process Clause of the United States Constitution if it is arbitrary or operates to deny a fair opportunity to rebut it."); see also

Western & A. R.R., 279 U.S. at 642, 49 S. Ct. at 447, 73 L. Ed. 884.

Every immunity is in some sense a denial of process, but an immunity that cannot be rebutted is particularly dubious. If DMWW is not given the opportunity to rebut the presumption that drainage is always in the interest of the public health and welfare then drainage district immunity fails the procedural due process test.

Drainage district immunity violates both the substantive and procedural due process guarantees of the Iowa Constitution.

3. Drainage district immunity from any nuisance claim takes DMWW's property without just compensation.

At a minimum, drainage district immunity cannot bar DMWW's claim to just compensation for a taking.

This Court has recognized that an absolute immunity granted to a nuisance is a per se taking under Iowa Const. Art. I, § 18. Gacke, 684 N.W.2d at 174; see also Dalarna Farms, 792 N.W.2d at 663; Bormann, 584 N.W.2d at 314. An immunity to create and maintain a nuisance is considered a permanent easement in favor of a dominant estate over a servient estate. Gacke, 684 N.W.2d at 174; see also Dalarna Farms, 792 N.W.2d at 663; Bormann, 584 N.W.2d at 314. The servient estate is therefore entitled to recover just compensation damages arising from the permanent easement. Dalarna Farms, 792 N.W.2d at 663-64.

The facts alleged here fit that pattern. Drainage Districts are the dominant estate as they are upstream of DMWW's intake points on the Raccoon River. (App. 22 ¶ 127, App. 23-25 ¶ 136). The Drainage Districts are creating a nuisance by polluting the Raccoon River. (App. 19 ¶ 107, App. 25-29 ¶ 137-155). Drainage Districts claim the legislature empowered the Drainage Districts to pollute and perhaps even *requires* them to pollute by not granting any express power to abate pollution. (App. 199). Even if true, DMWW is entitled to just compensation for the diminution in value of its property caused by the Drainage Districts' pollution. Gacke, 684 N.W.2d at 175.

Thus, even if the immunity applies to DMWW's tort claims, DMWW is still entitled to just compensation in the form of damages for the diminished value of its property occasioned by the Drainage Districts' permanent easement over DMWW's property.

4. Immunity from claims denies inalienable rights as applied to this case.

Drainage district immunity also denies inalienable rights protected by Iowa Const. Art. I, § 1. This section secures "Iowa common law rights that pre-existed Iowa's Constitution." Atwood v. Vilsack, 725 N.W.2d 641, 651 (Iowa 2006). An actionable riparian right to clean water is one of those ancient principles that predates Iowa's statehood:

> It is a principle of the common law, that the erection of any thing in the upper part of a stream of water, which poisons, corrupts, or renders it offensive and unwholesome, is actionable. And this principle not only stands with reason, but it is supported by unquestionable authority ancient and modern.

Howell v. M'Coy, 1832 WL 2994, at *9, 3 Rawle 256, 269 (Pa. 1832); see also Ferguson, 42 N.W. at 449.

Inalienable rights embody standards not dissimilar to equal protection and due process. Jacobsma, 862 N.W.2d at 352. However, the Inalienable Rights Clause is not "a mere glittering generality without substance or meaning." Gacke, 684 N.W.2d at 176 (citation omitted). It serves as a restraint to the arbitrary exercise of government power. Gibb v. Hansen, 286 N.W.2d 180, 186 (Iowa 1979). As a result, an immunity that shields a tortfeasor for damages must be "reasonably necessary" and not "unduly oppressive." Gacke, 684 N.W.2d at 178 (citing Gibb, 286 N.W.2d at 186); see also Dalarna Farms, 792 N.W.2d at 663.

In nuisance cases involving immunities, the Court's inalienable rights analysis has been linked with its analysis of just compensation for takings under Iowa Const. Art. I, § 18. As argued previously, DMWW is entitled to just compensation in the form of reduction in value of DMWW's property caused by the Drainage Districts' taking. However, DMWW can also recover other damages for non-constitutional claims because drainage

district immunity also violates the Inalienable Rights Clause. Gacke, 684 N.W.2d at 175; Dalarna Farms, 792 N.W.2d at 664.

The rights secured by the Inalienable Rights Clause are subject to reasonable exercise of the police power, and this requires balancing of the public benefit against the burden on a particular individual. Gacke, 684 N.W.2d at 178. However, for an immunity to be valid it must be of benefit to the public at large and not harm the interests of an individual. Id. at 179; Gravert v. Nebergall, 539 N.W.2d 184, 186 (Iowa 1995); Gibb, 286 N.W.2d at 186.

First it is necessary to identify benefit to the public at large of drainage district immunity. The Drainage Districts have asserted that they confer the benefits of modern agriculture. (App. 181-183). DMWW does not deny that modern agricultural methods have generated immense gains in food production. However, the actual question is not whether modern agriculture confers public benefits. Rather, the question is whether drainage district immunity benefits the public.

The distinction is subtle but significant. Immunity is not necessary to have an effective system of drainage. Other states have subjected drainage infrastructure to liability for torts without jeopardizing their agrarian economies. Parriott, 410 N.W.2d at 99-100; Dougan, 757 P.2d at 279. Since

immunity is not necessary to have drainage infrastructure, the Drainage Districts cannot claim that modern agriculture is dependent upon drainage district immunity.

Immunity certainly has a private benefit to the landowners within the Drainage Districts' boundaries. However, shielding a discrete group from the costs of pollution does nothing for the general welfare. Gacke, 684 N.W.2d at 178-79. Indeed, that shield encourages and perpetuates pollution practices without regard for downstream costs. This is a public injury, not a public benefit.

Second, it is necessary to identify the harm to individual interests caused by the immunity. Id. DMWW and the public are suffering great injury from nitrate pollution (App. 9-19 ¶¶ 45-107). When this injury is shielded from redress, drainage district immunity directly harms the financial interests of the public and DMWW. (App. 18-19 ¶¶ 99-107).

The Court in Gacke noted three characteristics that warranted application of the Inalienable Rights Clause to invalidate a statutory nuisance immunity. First, the Court noted that the plaintiffs received no individualized benefit from the immunity. 684 N.W.2d at 178-79. Second, the plaintiffs preexisted the defendant confinement feeding operation. Id. Finally, the Court considered whether the statute denied an injured person

any right of recovery. Id. These factors revealed the "oppressive effect of the statutory immunity . . . ." Id. at 179. As a consequence, the Court distinguished Gacke from cases where plaintiffs merely suffered some adversity from the operation of an immunity. The fundamental principle derived from Gacke is that an immunity that permits one person to use land without due regard for the rights of another violates Art. I, § 1 of the Iowa Constitution.

Like the aggrieved plaintiffs in Gacke, DMWW does not receive any particular benefit from drainage district immunity. Whatever benefit immunity confers to the public at large is more than offset in DMWW's case by the substantial expenses it incurs as a result of the Drainage Districts' operation. (App. 18-19 ¶¶ 99-107). DMWW also preexisted the Drainage Districts in DMWW's use of the Raccoon River. (App. 14 ¶ 70). Finally, continued application of the immunity denies DMWW any right of recovery.

DMWW recognizes that a "balancing of interests is necessarily a fact-specific enterprise." Dalarna Farms, 792 N.W.2d at 664. However, the Court can provide guidance to the District Court on the record here. Drainage Districts assert that there is no state of facts under which DMWW can obtain relief for their nuisance or for other claims set forth in Counts III through X. (App. 110-111). The Court could conclude that there may be a state of facts

under which DMWW could obtain relief, and answer the certified question accordingly. Alternatively, the Court could rely upon DMWW's detailed Complaint that outlines the continuing harm that DMWW suffers. These facts, if taken as true and considered in the light most favorable to DMWW, establish that the Drainage Districts are causing harm that far outweighs the public benefit of the Drainage Districts' immunity.

Certified Question 1 should be answered to permit DMWW's claims for damages to proceed because of the drainage district immunity's serious constitutional issues.

III. IN RESPONSE TO CERTIFIED QUESTION 2 THE COURT SHOULD HOLD THAT DRAINAGE DISTRICT IMMUNITY DOES NOT APPLY TO ALL EQUITABLE REMEDIES OTHER THAN MANDAMUS

Certified Question 2 has been preserved and is properly presented for review because it was raised, briefed, and argued to the District Court on motion, (App. 110-178), and was properly certified to this Court pursuant to Iowa Code Chapter 684A, (App. 294-319). Review is to answer the question of law as certified. Iowa Code § 684A.1.

The Drainage Districts assert immunity not only from all claims for damages, but also from all of DMWW's claims for equitable relief. Drainage Districts argue the only relief possible against them is a suit in mandamus to enforce a ministerial duty. (App. 116) (citing Chicago Cent. & Pac. R.R. Co.

v. Calhoun Cnty. Bd. Of Sup'rs, 816 N.W.2d 367, 373-74 (Iowa 2012)). There are, however, cases in which remedies other than mandamus have been allowed.

As a threshold matter, all of the arguments set forth above with respect to immunity from damages also apply with at least equal force to the equitable claims made by DMMW. Indeed, they would apply with even greater force to the extent the immunity from damages rests on some fiscal notion of preserving districts from financial claims because such notion would not warrant the denial of equitable relief necessary for drainage districts to conform their conduct to the requirements of law.

In either case, despite Drainage Districts' arguments to the contrary, Iowa courts have entertained suits in equity in various kinds of drainage cases other than mandamus. As early as 1905, the court considered a challenge in equity, on constitutional grounds, to a discretionary decision of a Board of Supervisors to authorize the formation of a drainage system. See Sisson, 104 N.W. at 461; see also Polk Cnty. Drainage Dist. Four, 377 N.W.2d at 241 (holding drainage district liable to state administrative proceedings); Reed v. Muscatine Louisa Drainage Dist. No. 13, 263 N.W.2d 548, 551 (Iowa 1978) (affirming decree setting aside deed to drainage district property sold without proper compliance with Iowa Code §

332.13(2)); Voogd v. Joint Drainage Dist. No. 3-11, 188 N.W.2d 387 (Iowa 1971) (sustaining collateral attack on a drainage district assessment determined to be void by reason of defective procedures and issuing injunctive relief with respect thereto); Busch v. Joint Drainage Dist. No. 49-79, Winnebago and Hancock Cntys., 198 N.W. 789, 797-98 (Iowa 1924) (affirming district court order granting certiorari).

These cases make plain that drainage districts are not totally immune from equitable claims in a proper case, and must generally follow the law. As explained in Sedore v. Board of Trustees of Streeby Drainage District No. 1 of Wapello and Davis Counties, 525 N.W.2d 432, 433 (Iowa App. 1994), a suit may be heard in order "to compel, complete, or correct the performance of a duty or the exercise of power by those acting on behalf of a drainage district."

The Motion giving rise to the Certified Questions did not address the substantive "merits" of Counts III through X of the Complaint. Rather it indiscriminately attacked them all—generally arguing no relief, save mandamus, may be granted. Thus, since the Drainage Districts claim total immunity from any suit, except for claims in mandamus, they greatly overshoot the mark as applied to the claims for equitable relief made by DMWW. For example, a drainage district can be subject to equitable relief

when it disposes of its property in violation of the statutory procedure governing sales by counties. See Voogd, 188 N.W.2d 387; Reed, 263 N.W.2d 548.

Similarly, drainage districts should be subject to equitable relief for violation of the Iowa statute which defines the following act as a statutory nuisance:

> The corrupting or rendering unwholesome or impure the water of any river, stream, or pond, or unlawfully diverting the same from its natural course or state, to the injury or prejudice of others.

Iowa Code § 657.2(4).

Certified question 2 should be answered to permit claims for equitable remedies to be considered on their merits.

IV. IN RESPONSE TO CERTIFIED QUESTION 3 THE COURT SHOULD HOLD THAT DMWW CAN ASSERT CONSTITUTIONAL PROTECTIONS AGAINST THE DRAINAGE DISTRICTS

Certified Question 3 has been preserved and is properly presented for review because it was raised, briefed, and argued to the District Court on motion, (App. 110-178), and was properly certified to this Court pursuant to Iowa Code Chapter 684A, (App. 294-319). Review is to answer the question of law as certified. Iowa Code § 684A.1.

The Court should recognize that (A) DMWW has rights under the

Iowa Constitution, and (B) may assert such rights to defeat immunity that might otherwise apply, and (C) to assert a takings claim against the Drainage Districts.

A. DMWW Has Constitutional Rights under the Iowa Constitution

Drainage Districts argued to the District Court, based on Board of Trustees of Monona-Harrison Drainage District Number 1 in Monona and Harrison Counties v. Board of Supervisors of Monona County, Iowa, 5 N.W.2d 189, 191 (Iowa 1942) that under Iowa law[8] DMWW has no constitutional rights that DMWW may assert in aid of its claims in the District Court. They made this argument broadly in order to bolster their claim of immunity despite the constitutional infirmities that such immunity presents, and also to deny DMWW any consideration of its takings claims under the Iowa Constitution.

In Monona-Harrison, the Court did reject a constitutional claim made

[8] The Drainage Districts also rely upon a line of federal authority exemplified by Hunter v. City of Pittsburgh, 207 U.S. 161, 28 S. Ct. 40, 52 L. Ed. 151 (1907) to argue that DMWW does not have "standing." (App. 118-119). This argument focuses on a disputed federal doctrine. See Kathleen S. Morris, The Case for Local Constitutional Enforcement, 47 Harv. C.R.-C.L. L. Rev. 1, 19-26 (2012). The Drainage Districts' argument is not traditional standing analysis under Iowa law. See Godfrey v. State, 752 N.W.2d 413, 418 (Iowa 2008) (recognizing the state law standing doctrine is not derived from the Iowa Constitution).

by a joint drainage district against another drainage district, first because it stated that "a quasi municipal corporation may not challenge the authority of its creator" but also because it found the claim to be without substantive merit. Monona-Harrison, 5 N.W.2d at 191. The Monona-Harrison rule, sought to be applied here, was based on a limited view of the powers of municipal entities. Id. ("Appellee is a legislative creation which has no rights or powers other than those found in the statutes which gave and sustain its life."). However, the general rule that the Drainage Districts derive from Monona-Harrison cannot be reconciled with other cases in which the Iowa Supreme Court had previously reached and decided constitutional questions in drainage district disputes. See Bd. of Trs. of Monona-Harrison Drainage Dist. No. 1 v. Bd. of Sup'rs of Woodbury and Monona Cnty., 197 N.W. 82, 85 (Iowa 1924); Bd. of Sup'rs of Pottawattamie Cnty. v. Bd. of Sup'rs of Harrison Cnty., 241 N.W. 14 (Iowa 1932).

An examination of the question of whether DMWW has Iowa constitutional rights, in view of Monona-Harrison, must begin with DMWW's governing statute which grants it the express power to be "a party to legal action" and the right to "exercise all powers of a city" with respect to its utility with limited exceptions. Iowa Code § 388.4. These powers should be understood expansively under Iowa Constitution Art. III, § 38A,

but must also be understood to not include the power of taxation. Iowa Code § 388.4(1).

Thus, there is no conceptual impediment to the possession and exercise of constitutional rights by DMWW based on the idea of limited powers—which disposes of the rationale of Monona-Harrison as applied here. Monona-Harrison is simply an embodiment of the Dillon Rule, which no longer forms any part of the law of Iowa, as previously discussed.

Further, the rationale that a drainage district as a "quasi-corporation" could not challenge the "authority of its creator," has no application here because DMWW and Drainage Districts have no such relationship. (App. 115). In any case this Court has recently reached the merits of a constitutional issue raised by a municipality against a state board. City of Coralville v. Iowa Utilities Bd., 750 N.W.2d 523, 530-31 (Iowa 2008)

Finally, the Court has always recognized that a political subdivision has constitutional rights when it acts in a proprietary, rather than governmental, capacity, and has applied that rule to municipal utilities. See, e.g., Scott Cnty. v. Johnson, 222 N.W. 378, 382 (Iowa 1928) ("[A] municipal corporation may have a dual capacity and in addition to its public capacity may acquire and exercise proprietary rights which are in the nature of private rights. A city acquiring and operating a public utility might be so

classified."); Incorporated Town of Sibley v. Ocheyedan Elec. Co., 187 N.W. 560, 562 (Iowa 1922) ("It is a well recognized and generally established rule that municipalities have two classes of power—one legislative, public and government; the other, proprietary and quasi private."); State v. Barker, 89 N.W. 204, 207 (Iowa 1902) ("We have already called attention to the dual nature of municipal corporations, and have discovered that with respect to private and proprietary rights and interests they are entitled to constitutional protection. It is quite clear that the establishment and control of waterworks for the benefit of the inhabitants of the city is a matter that pertains to the municipality as distinguished from the state at large." (internal citations omitted)).

A political subdivision such as DMWW operating in a proprietary capacity has, and can vindicate, constitutional rights as fully as any other entity.

Certified question 3 should be answered to recognize that DMWW has constitutional rights that should be considered in this case.

B. DMWW May Assert Constitutional Rights to Obtain Relief From the Drainage Districts

Iowa generally permits suits between political subdivisions. See, e.g., City of Akron v. Akron Westfield Cmty. Sch. Dist., 659 N.W.2d 223 (Iowa 2003); City of W. Branch v. Miller, 546 N.W.2d 598, 606 (Iowa 1996); City

of Ames v. Story Cnty., 392 N.W.2d 145 (Iowa 1986). Iowa even permits constitutional claims by a political subdivision against the state. See City of Coralville, 750 N.W.2d at 530-31. There is no reason that claims between political subdivisions with a constitutional dimension are somehow barred while claims based on common law or statute are permitted.

DMWW recognizes that there is a line of authority that holds county officers and counties lack standing to challenge the constitutionality of a state statute. Bd. of Sup'rs of Linn Cnty. v. Dept. of Revenue, 263 N.W.2d 227, 232 (Iowa 1978). One reason the Court concluded counties should not be permitted to challenge the constitutionality of a state statute was because it "may not question that power which brought it into existence and set the bounds of its capacities." Id. (quoting C. Hewitt & Sons Co. v. Keller, 275 N.W. 94, 97 (Iowa 1937)). The Court has also explained that since counties and county officials have no pecuniary or personal interest in constitutionally of a state law they should not be permitted to challenge a state statute. Bd. of Sup'rs of Linn Cnty., 263 N.W.2d at 232.

This line of authority is inapplicable to this case for three reasons. First, DMWW does not challenge the constitutionality of Iowa Code Chapter 468 or any other statute. Rather, DMWW asserts that the judicially created immunity granted drainage districts and the present operation of the

Drainage Districts infringe on DMWW's constitutional rights rendering this case an "as-applied" challenge to Drainage District activity.

Second, the rationale for limiting county capacity to sue is based on a version of the now antiquated Dillon Rule, which is no longer the law in Iowa.

Finally, unlike a county official seeking to avoid performing a ministerial duty, DMWW is a proprietary entity with a pecuniary interest in the outcome of this case. Without relief from the Court, DMWW will continue to incur nitrate removal and capital expenditure costs. (App. 29-30 ¶ 158).

Certified question 3 should be answered to recognize that DMWW may assert constitutional rights against the Drainage Districts.

C. DMWW Has an Iowa Constitution Takings Claim

In addition to the arguments set forth above, DMWW asks this Court to consider, at a minimum, if DMWW is permitted to assert a takings claim under Iowa Constitution Art. I, § 18, without regard to the character of DMWW as a municipal entity, and free from any claim of immunity in favor of the Drainage Districts.

Even if the nature and extent of DMMW's other constitutional rights was subject to dispute, DMWW's right to make a takings claim should not

be. Takings law draws no distinction between public and private condemnees. U.S. v. 50 Acres of Land, 469 U.S. 24, 31, 105 S. Ct. 451, 455–56, 83 L. Ed. 2d 376 (1984) (the term "private property" as used in the Fifth Amendment includes the property of state and local governments and the principles of compensation are the same for both private and public condemnees); see, also, Wayne Cnty., Ky. v. U.S., 53 Ct. Cl. 417, 424 (Ct. Cl. 1918), affirmed per curiam U.S. v. Wayne Cnty., Ky, 252 U.S. 574, 40 S. Ct. 394, 64 L. Ed. 723 (1920); State ex rel. Bd. of R.R. Com'rs of State of Iowa v. Stanolind Pipe Line Co., 249 N.W. 366, 369 (Iowa 1933). As a matter of law, DMWW is not disabled from making a takings claim simply because it is a political subdivision.

Furthermore, Drainage Districts are not exempt from paying just compensation simply because they are drainage districts. Although, drainage district immunity for damages has been broadly stated in the cases, the application of that rule to preclude takings claims is unwarranted.

The constitutional authority to create drainage districts is found in the eminent domain section of the Iowa Constitution. Iowa Const. Art. I, § 18, makes reference to use by drainage districts of the power of condemnation. This unequivocally demonstrates that the Drainage Districts must pay for their takings. There is simply no warrant for construing the eminent domain

provisions of the Iowa Constitution to permit the Drainage Districts to accomplish uncompensated takings from DMWW. The Drainage Districts must pay their own way, and Article I, § 18 does not condition payment of just compensation on the identity of the party receiving compensation.[9]

Certified question 3 should be answered to recognize that DMWW has and may assert takings claims under the Iowa Constitution.

V. IN RESPONSE TO CERTIFIED QUESTION 4 THE COURT SHOULD HOLD THAT DMWW HAS PROPERTY INTERESTS PROTECTED UNDER THE IOWA CONSTITUTION'S TAKINGS CLAUSE

Certified Question 4 has been preserved and is properly presented for review because it was raised, briefed, and argued to the District Court on motion, (App. 110-178), and was properly certified to this Court pursuant to Iowa Code Chapter 684A, (App. 294-319). Review is to answer the question of law as certified. Iowa Code § 684A.1.

The Iowa Constitution prohibits government taking of private property without just compensation. Bormann v. Bd. of Sup'rs in and for Kossuth Cnty., 584 N.W.2d 309, 315 (Iowa 1998). The existence of

[9] Even if drainage district immunity was otherwise thought to bar or restrict DMWW's constitutional right to just compensation, such immunity could not withstand the strict scrutiny applied to the deprivation of fundamental rights, as argued previously.

"property" is determined by an analysis of the owner's "relation to the physical thing, as the right to possess, use and dispose of it." Id. (quoting U.S. v. General Motors Corp., 323 U.S. 373, 65 S. Ct. 357, 89 L. Ed. 311 (1945)). As argued previously, DMWW's property is considered "private" for this purpose. Stanolind Pipe Line Co., 249 N.W. at 369.

As a municipal utility created pursuant to Iowa Code Chapter 388, DMWW has control over the acquisition, use, and disposition of its water facilities, including its real estate adjacent to the Raccoon River. Iowa Code § 388.4(2).

By operating without regard to the pollution discharged into the Raccoon River, Drainage Districts impose an undue burden and cost on DMWW. The constitutional requirement of just compensation is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Perkins v. Bd. of Sup'rs of Madison Cnty., 636 N.W.2d 58, 69-70 (Iowa 2001) (quoting Armstrong v. United States, 364 U.S. 40, 49, 80 S. Ct. 1563, 1569, 4 L. Ed. 2d 1554 (1960)).

DMWW has two protectable property interests that Drainage Districts are impairing: (A) DMWW's right to obtain clean water from the Raccoon River, and (B) DMWW's ability to use its treatment plant and facilities free

of the dangerous levels of nitrate that the Drainage Districts discharge into the Raccoon River.

A. Drainage Districts Are Taking DMWW's Right to Clean Water

As a consequence of owning real estate adjacent to the Raccoon River, DMWW has a property interest in the water adjacent to its real property. Such riparian rights protect DMWW from intrusions in the form of impediments to navigation, reduced water level, excessive water level, and pollution. Davis at 220-29.[10] Iowa law provides that owners of property adjacent to a navigable river have common law rights apart from those of the general public. Robert's River Rides, 520 N.W.2d at 299-300; Davis at 220. Any action that impairs DMWW's riparian rights is actionable. Freeman v. Grain Processing Corp., 848 N.W.2d 58, 67 (Iowa 2014) (citing Bowman v. Humphrey, 109 N.W. 714, 714-15, 717 (Iowa 1906)); Willis v. City of Perry, 60 N.W. 727, 729 (Iowa 1894).

In Bowman, this Court held that one who "substantially pollutes or destroys the usefulness and value of the water to the proprietors of the lower lands" is liable for nuisance. 109 N.W. at 715. Bowman is consistent with

[10] See Davis at 216-229 (providing a general discussion of the historical foundations of the doctrine of riparian rights and Iowa's adoption of that doctrine).

Iowa cases that stand for the principle that "one must exercise ordinary care in the use of his property so as not to injure the rights of neighboring landowners." Oak Leaf Country Club, Inc. v. Wilson, 257 N.W.2d 739, 745 (Iowa 1977) (citing Tretter v. Chicago & G. W. Ry. Co., 126 N.W. 339, 341 (Iowa 1910)); accord Newton v. City of Grundy Center, 70 N.W.2d 162, 165 (Iowa 1955) ("We have held abatable as a nuisance instances where there was a pouring of filth from the sewers into a stream instead of first rendering the sewage innocuous."); Vogt , 110 N.W. at 603 ("The statute authorizes the city to construct a system of sewers, but it nowhere authorizes it to discharge its sewage into a running stream."); Perry v. Howe Co-Op. Creamery Co., 101 N.W. 150, 150-51 (Iowa 1904) (finding no nuisance where a creamery constructed a cesspool to limit infiltration of pollution into a stream); Ferguson, 42 N.W. at 449 ("The upper owner will not be allowed to poison or corrupt the stream."); see also Davis at 228-229.

DMWW owns property along the Raccoon River which it uses to withdraw water from the Raccoon River under a state permit for treatment and sale to its customers. (App. 2 ¶ 4). Drainage Districts are invading DMWW's property by discharging dangerous levels of nitrate into the Raccoon River. (App. 25-27 ¶ 139). As a result of this pollution, DMWW must take extensive measures to ensure that it complies with federal drinking

water standards. (App. 29-30 ¶ 158). Drainage Districts are physically invading DMWW's riparian water right to clean and unpolluted water and that invasion is permanent. (App. 18-19 ¶ 98-107).

Even though the State of Iowa has enacted statutes governing water, Iowa Code Ch. 455B, the legislature did not preempt or extinguish other common law and statutory rights. Iowa Code § 455B.111(5); Freeman, 848 N.W.2d at 87, 88 cert. denied, 135 S. Ct. 712 (2014) ("In short, we think Iowa Code chapter 455B did not impliedly repeal application of Iowa Code Chapter 657 to air pollution claims or preempt Iowa common law."). Thus, DMWW has a protectable property right under Iowa law to clean, unpolluted water in the Raccoon River.

Certified question 4 should be answered to recognize that DMWW has a protected property interest in clean water.

B. Drainage Districts Are Taking DMWW's Right to Use Its Facilities by Discharging Excessive Levels of Nitrate

Drainage Districts' discharge of excessive nitrate into the Raccoon River also physically invades DMWW's use and enjoyment of its lands and treatment facilities. DMWW's treatment plants and related facilities, are being infiltrated and impaired by nitrate in Drainage Districts' discharge. (App. 29-30 ¶¶ 157-158). As articulated throughout the Complaint, DMWW has built substantial infrastructure to contend with Drainage Districts'

discharge of nitrate into the Raccoon River. Id.

DMWW draws into its treatment plant the excessive pollution that the Drainage Districts discharge. This represents a physical invasion by Drainage Districts of DMWW's infrastructure. (App. 25-30 ¶¶ 137-158).

Certified question 4 should be answered to recognize that DMWW has a protected property interest to be free from the invasion of its right to use of its facilities.

CONCLUSION

For the reasons set forth above, DMWW respectfully requests that the Court recognize DMWW's right to obtain redress from the Drainage Districts.

REQUEST FOR ORAL ARGUMENT

Board of Water Works Trustees for the City of Des Moines, Iowa respectfully requests to be heard at oral argument prior to submission.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 13,715 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman font and utilizing the 2010 edition of Microsoft Word in 14 point font plain style.

/s/ John E. Lande
Signature

March 25, 2016
Date

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 25th day of March, 2016, I electronically filed the foregoing document with the Clerk of the Supreme Court by using the Iowa Judicial Branch electronic filing system which will send a notice of electronic filing to the following:

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